

NOTES

LET THEM SELL ART: WHY A BROADER DEACCESSION POLICY TODAY COULD SAVE MUSEUMS TOMORROW

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I. INTRODUCTION

In 1972, a New York Times critic unceremoniously introduced the public to deaccessioning when he outed the Metropolitan Museum of Art for selling art “now that cash is hard for them to find.”¹ Since then, deaccessioning has become a widely implemented process that museums use to (1) remove a qualified object from the museum’s collection record and (2) dispose of the object through sale, auction, gift, trade, or destruction.² Despite wide implementation, there is currently a deaccessioning “crisis”³ that has instigated public outcry and even legislative reform.⁴ The crisis stems from the recent financial crisis, which has deeply affected museums. Museums are being forced to choose between making huge cut backs—even permanent closure—and deaccessioning portions of collections at the risk of lawsuits and condemnation. Museums should not have to choose. Instead, museums

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¹ Prior to 1972, deaccessioning had gone largely unnoticed by the public. In that year, the Metropolitan Museum attempted to sell art from its collections as it had been doing quietly for the past twenty years. Stephen K. Urice, *Deaccessioning: A Few Observations*, ALI-ABA COURSE OF STUDY: LEGAL ISSUES IN MUSEUM ADMIN. (2010), available at http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CR005_chapter_09_thumb.pdf. The donor, Adelaid Nilton de Groot, of the pieces in question, however, had left precatory language requesting the museum to contribute unwanted art to other New York or Connecticut museums. *Id.* In the end, the museum and the New York Attorney General developed new deaccession policies for the museum. *Id.*

² The term, though fairly new, is well established in the museum community and beyond as evidenced by the DePaul University Art Museum’s 2010 exhibit “The Good, the Bad and the Ugly: Museum Collections and ‘Deaccessioning,’” a public exhibition devoted to informing the public how deaccessioning decisions are made and which is made up of twenty-five museum works to be deaccessioned when the exhibit closes. *DePaul University Art Museum Exhibition Exploring Process of Paring Down Museum Collections to Open*, TARGETED NEWS SERVICE LLC, Jan. 5, 2010.

³ Derek Fincham, *Deaccession of Art and the Public Trust* 1 (March 2010) (work in progress), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1470211.

⁴ Jennifer L. White, *When It’s OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1042 (1996). See generally THE DEACCESSION BLOG, <http://clancoc-theartdeaccessioningblog.blogspot.com/> (highlighting the deaccession debate across the arts and legal communities) (last visited Sep. 1 2010).

should be able to deaccession objects out of financial necessity and be able to apply a limited portion of disposal proceeds to defray operating costs.

The recent financial crisis turned deaccessioning from a tool used to improve collections into a necessity used to save collections. Museums were hit by the financial crisis in many ways: endowments invested in the stock market shrank, government and corporate funding dwindled, and individual donors could no longer afford donations.⁵ To illustrate, the New York Metropolitan Museum of Art's ("The Met") endowment shrank 24 percent from 2008 to 2009. Meanwhile, the operating deficit increased from \$1.9 million to \$8.4 million from fiscal 2008 to fiscal 2009.⁶ During that same period, museum membership declined by nearly 10 percent,⁷ total income declined by 20 percent,⁸ and liabilities increased by 22 percent.⁹

As a result of the financial strain, museums have laid off employees, cancelled shows, and cut back operating hours.¹⁰ For example, The Met cut 350 staff positions, reducing its workforce to 2200 employees.¹¹ For several, however, permanent closure has been unavoidable.¹²

In addition to cutbacks and layoffs, some museums have sought to use deaccessioning to defray the financial strain.¹³ Museums use deaccessioning to remove objects that have become financial burdens or to sell objects and apply proceeds toward operating costs. Museums keep 90 percent of their collections in storage at a large cost.¹⁴ Stored collections are normally used for research and study; the cost of storage, however, limits research access and makes appropriate maintenance difficult.¹⁵ By culling storage collections, museums can alleviate some of the financial burdens and ensure that the remaining pieces are properly cared for.

Some museums have also attempted to defray financial strain by applying deaccession proceeds to operating costs.¹⁶ This use of

⁵ See *infra* note 60.

⁶ METRO. MUSEUM OF ART, ONE HUNDRED THIRTY-NINTH ANNUAL REPORT OF THE TRUSTEES FOR THE FISCAL YEAR JULY 1, 2008 THROUGH JUNE 30, 2009, 50 (2009).

⁷ *Id.*

⁸ *Id.* at 51 (describing 2009 as the "most challenging fundraising environment in decades").

⁹ *Id.* at 52 (explaining that the increase was due to higher investment trade payables, pensions, and postretirement obligations).

¹⁰ See Judith H. Dobrynski, *The Art of the Deal*, N.Y. TIMES, Jan 2, 2010, at A21 (stating that "[m]useums everywhere are having trouble making ends meet, what with the overblown expansions they've made, the decline in investment income and the steep drop-off in contributions from foundations and individuals," and stating further that "[m]any have cut staff, frozen pay, trimmed exhibition schedules and slowed or stopped acquisitions.").

¹¹ Jason Edward Kaufman, *Metropolitan Cuts Major Loan Shows by a Quarter*, THE ART NEWSPAPER (2009), <http://www.theartnewspaper.com/articles/Metropolitan-cuts-major-loan-shows-by-a-quarter/18702> (last visited Sep. 8, 2010).

¹² See *infra* note 34.

¹³ Jonathan Lee Rohner, *Profiting from Paintings and Paying the Price: The Implications of Increased Deaccessioning for General Operating Expenses in U.S. Art Museums* 8 (2010) (unpublished Masters Dissertation, Columbia University), available at <http://pocketknowledge.tc.columbia.edu/home.php/viewfile/81275>.

¹⁴ *Id.* at 14.

¹⁵ Smithsonian Institute scholar and former deputy director of the Hirshhorn Museum and Sculpture Garden Stephen Weil points out that "no museum can afford today to clog its scarce storage space with unconsidered collections that have simply been allowed to accumulate and lie fallow." STEPHEN WEIL, *Introduction to A DEACCESSION READER* 1 (Stephen Weil ed., photo. reprint 2000) (1997).

¹⁶ See *infra* notes 60–61 and accompanying text.

deaccessioning has alarmed the arts community, most of which follows policies requiring that funds from sale or auction of museum objects be used solely for future acquisitions and in some cases the direct care of current collections.¹⁷ For example, the Art Institute of Chicago made \$910,000 from the sale of art objects in fiscal 2009.¹⁸ The museum classified the proceeds as “temporarily restricted” which means both the principal and earned income may be used only for acquisitions.¹⁹

Deaccessioning for financial reasons—opposed to investment for future acquisitions—has raised ethical concerns that collections will be used as liquid assets at the discretion of museum board members. Museum boards have a fiduciary duty to hold collections in trust for the benefit of the public. This duty stems from a museum’s legal identity as either a charitable trust or a non-profit corporation.²⁰ Board members of both types of museums are held to duties of care and loyalty that guide the management decisions that boards make on behalf of the beneficiaries—the public. The controversies over deaccessioning have led to lawsuits brought by attorney generals to protect public interest.²¹ Because most of these lawsuits end in settlement between the parties, however, courts have yet to establish the standard of fiduciary duties of museum board members.²² Some jurisdictions have applied the business judgment rule standard, a concept from corporate law, to protect decisions made by non-charitable corporate boards.²³ Other jurisdictions have applied the prudent investor rule, a concept from trust law, to judge a non-profit corporation’s investment decisions.²⁴

While the judicial common law remains undecided, museums are guided by professional ethical codes promulgated by the American Association of Museums and the Association of Art Museum Directors.²⁵ Both associations have established ethics codes that limit which objects qualify to be deaccessioned and how the deaccession proceeds may be used.²⁶ Though not legally enforceable, these ethics codes are tightly enforced within the museum community to avoid far-reaching association sanctions.²⁷ Neither association has amended its deaccessioning policies since the recent financial crisis.

This Note proposes that deaccession policies should be broadened to (1) allow museums to deaccession objects based on financial necessity and (2) allow museums to apply deaccession proceeds to operating costs. Part II

¹⁷ See THE AM. ASS’N OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS (2000) [hereinafter AAM CODE], available at <http://www.aam-us.org/museumresources/ethics/coe.cfm>; ASS’N OF ART MUSEUM DIRS., PROF’L PRACTICES IN ART MUSEUMS (2001) [hereinafter AAMD PROF’L PRACTICES], available at <http://www.aamd.org/about/documents/ProfessionalPractices2001.pdf>.

¹⁸ ART INSTITUTE OF CHICAGO, CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED JUNE 30, 2009 AND 2008, AND INDEPENDENT AUDITORS’ REPORT, 5 (2009).

¹⁹ *Id.* at 9.

²⁰ See *infra* Part III.

²¹ See *infra* note 60.

²² See *infra* notes 116–118 and accompanying text.

²³ See *infra* notes 116–118 and accompanying text.

²⁴ See *infra* notes 123–125 and accompanying text.

²⁵ See *supra* note 17.

²⁶ See *supra* note 17.

²⁷ See *supra* note 17; *infra* notes 168, 169.

details the effects of the current financial crisis on museums and the sometimes drastic measures museums are forced to take in order to survive. Part III explains the two different types of legal entities that museums are typically formed as and proposes that museum boards should be held to a two-tiered fiduciary standard to protect both deaccession decisions and public interest in deaccession proceeds. Part IV discusses state regulation and the national ethical codes that regulate museum deaccessioning and proposes that those ethical codes should be amended to reflect current museum needs. Part V explains the evolution of museums and how past collections practices have led to storage strains now exacerbated by the financial crisis. Part VI proposes a broader deaccession policy that would allow museums to deaccession objects to relieve financial strains and proposes that deaccession proceeds be placed in a fund, the corpus of which would be used for future acquisitions and the interest income would be split between care and management of current collections and operating costs. Part VII profiles a Canadian museum that successfully completed a large deaccession project to avoid bankruptcy by disposing of a number of collections and placing the proceeds in an income earning fund.

II. THE RECENT FINANCIAL CRISIS AND ITS EFFECT ON MUSEUMS²⁸

The same financial bubble that burst in the auto, real estate, and banking industries, bubbled and burst in the museum industry.²⁹ The financial crisis hit and is continuing to affect museums from multiple angles.³⁰ The stock market plummet has driven museum endowments down by 20 percent to 35 percent across the nation.³¹ The financial losses in other markets have shrunk corporate and private contributions.³² Deficits in state and local governments are crippling museum funding.³³ As a result, museums are struggling to keep doors open, maintain normal operations, and pay staff.³⁴ Director and counsel for administration at the Solomon R.

²⁸ The historic financial crisis came to a peak in 2009 when “the stock value of the global bank and insurance sector had fallen from a market cap of \$8,540 billion to only \$3,586 billion and write-downs and accumulated credit losses had ballooned from \$67 billion to a staggering \$1,038 billion.” Lawrence H. Berger, Jan Postma, & Nikolai J. Sklaroff, *Museum Challenges in Financially Troubled Times*, ALI-ABA COURSE OF STUDY MATERIALS: LEGAL ISSUES IN MUSEUM ADMIN. (2009).

²⁹ Ben Davis, *The Museum Bubble*, ARTNET MAG., <http://www.artnet.com/magazineus/reviews/davis/museum-bubble8-7-09.asp> (last visited Sept. 3, 2010).

³⁰ In two years, the Metropolitan Museum lost \$700 million, or 25 percent, of its endowment and \$4.7 million of operating support from New York City. James Panero, *The Culture Crash*, FORBES.COM, July 20, 2009, <http://www.forbes.com/2009/07/19/arts-museums-philanthropy-opinions-contributors-economic-crisis.html>.

³¹ See Jason Edward Kaufman, *Museums Make Deep Cuts in Face of Global Financial Crisis*, THE ART NEWSPAPER, Jan. 8, 2009, <http://www.theartnewspaper.com/article.asp?id=16704> (discussing the Art Newspaper’s survey of forty museums and their plans to cut between 5 percent and 20 percent of their 2009 budgets because of drops in endowments); Panero, *supra* note 30 (“The reductions in arts endowments reported over the past year have been significant . . .”).

³² Kaufman, *supra* note 31 (explaining that “US foundations shed \$200bn in value from the market peak in late 2007”).

³³ Panero, *supra* note 30.

³⁴ See Jillian Berman, *Museums’ Funding Sources Going Bone Dry*, USA TODAY, July 23, 2009, at 8D, (stating that “[p]lummeling endowments and decreases in donations and public financing are forcing museums to make large cutbacks, and some are even closing” and explaining that the loss of state support forced the Detroit Institute of Art to cut budgets by \$6 million and reduce staff); Dawoud Bey,

Guggenheim Fund addressed the 2010 ALI-ABA Legal Issues in Museum Administration conference with the following: “The economic downturn in the United States has had a devastating impact on the work forces of U.S. museums, with tumbling revenues leading to hiring freezes and reductions in force.”³⁵

Museum endowments’ recent losses are caused by two main factors: (1) the stock market decline and (2) museums’ dependence on “Yale model” investing.³⁶ The stock market decline is self-explanatory. The “Yale model” is a form of investing originally promoted by hired money managers and, during the good years, enjoyed by museums.³⁷ Museums were encouraged to seek “total returns” instead of “preserving capital and accruing dividend income”³⁸ and to invest in risky and alternative assets.³⁹ When the market turned sour, museum boards were too slow to “navigate away from the hazardous investments.”⁴⁰

In Hard Times Should Museums Be Allowed to Sell Their Artworks?, CHICAGONOW (July 6, 2009, 8:03 PM), <http://www.chicagonow.com/blogs/art-talk-chicago/2009/07/in-hard-times-should-museums> (“Along with the growing string of layoffs, museums across the country are also being forced to cancel or postpone exhibits that have been on the drawing board in some cases for years.”); Davis, *supra* note 29 (“Almost every week brings fresh news of museum cuts”). See also Mike Boehm, *Super-Rich Getty Trust to Slash Its Budget 25%; The Operator of Two L.A. Museums Has Lost \$1.5 Billion Since July*, L.A. TIMES, Mar. 16, 2009, at A1 (explaining that a 25 percent drop in its endowment investment forced the Getty Museum to cancel temporary exhibits, defer buying new art, and cut operating budgets); John Hechinger, *Brandeis Faces Suit Seeking to Stop Plans to Sell Art*, WSJ.COM, (July 27, 2009), <http://topics.wsj.com/article/SB124872539024884721.html> (explaining that trustees at Brandeis University voted to close the school’s museum because the endowment had plunged from \$712 million to \$540 million in one year, despite reducing expenditures by \$10 million and freezing budgets); Peggy McGlone, *When Museums Sell their Treasures ‘Deaccessioning’ Can Ignite a Controversy if It’s Not Done Artfully*, THE STAR-LEDGER (Newark), May 13, 2009, at News 1 (explaining that because of a loss in corporate, foundation and individual donations, which caused a \$600,000 budget shortfall, Montclair Art Museum cut back hours, laid off thirteen employees, and restricted the working hours of the remaining employees); Amy Rogers Nazarov, *Death with Dignity*, AM. ASS’N OF MUSEUMS, <http://www.aam-us.org/pubs/mn/dwdignity.cfm> (last visited Sept. 3, 2010) (explaining that Florida’s Gulf Coast Museum of Art closed and also explaining that the Minnesota Museum of American Art closed); Bill Van Siclen, *Best and Worst of Times*, PROVIDENCE JOURNAL-BULLETIN (Rhode Island), July 12, 2009, at Arts/Travel 1 (explaining that Rhode Island School of Design Museum’s endowment dropped 30 percent from January 2008 to July 2009 forcing the museum to lay off eight staff, cut large exhibitions, and close the museum for all of August); Siclen, *supra* (explaining that the Los Angeles Museum of Contemporary Art was on the verge of bankruptcy before billionaire Eli Broad bailed it out); Siclen, *supra* (explaining that the New York Metropolitan was forced to cut 350 staff to save money); Carol Vogel, *Guggenheim Will Cut 8 Percent of Its Positions*, N.Y. TIMES, June 17, 2009, at C3 (explaining that because the endowment dropped by 18 percent, the Guggenheim Museum had to cut 8 percent of its staff and reduce expenditures); BEAD SOC’Y OF GREATER WASH., <http://www.bsgw.org/> (last visited Sept. 3, 2010) (explaining that the Bead Museum closed because of operating costs); Press Release, Claremont Museum of Art, *Claremont Museum of Art to Discontinue Operation in the Packing House* (Dec. 22, 2009), available at http://www.claremontmuseum.org/press/press_releases/12-22-09.pdf (explaining that because of the bad economy, the Claremont Museum closed and placed its permanent collection in storage).

³⁵ Brendan M. Connell, Jr., *Museum Challenges in Financially Troubled Times: Trends and Lesson Learned*, ALI-ABA COURSE OF STUDY MATERIALS: LEGAL ISSUES IN MUSEUM ADMINISTRATION, I (2010).

³⁶ See Boehm, *supra* note 34 (discussing the Getty Trust’s commitment to the risky investment habits, called the “Yale model,” despite a \$2 billion drop in its endowment from mid-2007 through March 2009); Davis, *supra* note 29.

³⁷ Panero, *supra* note 30.

³⁸ *Id.*

³⁹ See Davis, *supra* note 29 (citing FOUNDATION & MONEY MANAGEMENT’S 2002 description of the Museum of Modern Art’s risky investments as “dabs and splatters of merger arbitrage funds, distressed debt funds, and long/short equity funds, as well as private equity and real estate.”).

⁴⁰ *Id.*

In addition to endowment losses, museums are suffering from drops in individual, corporate, and government funding. The financial crisis personally affected many individual donors⁴¹ and some of the largest donors were victims of the Bernie Madoff Ponzi scheme.⁴² For example, from 2001 to 2002, donations from the sixty biggest donors dropped from \$12.7 billion to \$4.6 billion.⁴³ Additionally, recent changes in tax regulation for in-kind contributions could de-incentivize individuals from donating to museums.⁴⁴ Large banking institutions were the largest corporate museum supporters; however the collapse, buy-outs, and cut-backs of large institutions, like Lehman Brothers, Wachovia, and Goldman Sachs,⁴⁵ gouged contributions.⁴⁶

At the federal level, Congress appropriated \$155 million to the National Endowment for the Arts for fiscal 2009, a \$21 million deficit from 1992.⁴⁷ State government subsidizing of museum operating expenditures has dropped from 40 percent to 25 percent since 2000.⁴⁸ Cash-strapped cities and states are trimming the “frivolous” subsidies that are often used to fund museums.⁴⁹ While economic forecasters predict that the worst of the financial crisis is over,⁵⁰ museums will continue to be negatively impacted.

The financial crisis forced museums into what the Brooklyn Museum calls a “new economic reality.”⁵¹ Museums across the nation are laying off staff, canceling exhibits, raising admissions prices, and closing extra days or even entire months.⁵² In the last year, about twenty museums closed permanently including Florida’s Gulf Coast Museum of Art, the Minnesota Museum of American Art, the Bead Museum, the Claremont Museum of Art, the Fresno Metropolitan Museum of Art, and the Las Vegas Museum of Art.⁵³

⁴¹ Reed Johnson, *After a Rebirth, Fresno Museum Closes; Financial Crash, Plus a Prolonged Renovation, Lead to Its Shuttering*, L.A. TIMES, Jan. 12, 2010, at D1 (“Because of the diminished value of their stock portfolios, long-time donors who had given annual gifts of \$25,000 and more ‘were informing us that they were lucky if they could give us a \$5,000 gift.’”).

⁴² See Rohner, *supra* note 13, at 81–82 (describing the financial losses of Brandeis University).

⁴³ Fincham, *supra* note 3, at 30 (citing Elizabeth Schwinn & Ziya Serdar Tumgoren, *The Megagift Plunge*, CHRON. PHILANTHROPY, Feb. 20, 2003, at 3).

⁴⁴ Fincham, *supra* note 3, at 30 (citing Martha Lufkin, *Why Some Millionaires Want This Tax*, ART NEWSPAPER, Mar. 2001, at 1; Miriam Souccar, *Charities Get More Donors, Fewer Dollars*, CRAIN’S NEW YORK, Oct. 16, 2009, <http://www.crainnewyork.com/article/20091016/FREE/910169993>).

⁴⁵ See Lawrence Berger, Jan Postma, & Nikolai J. Sklaroff, *Museum Challenges in Financially Troubled Times*, ALL-ABA COURSE OF STUDY MATERIALS: LEGAL ISSUES IN MUSEUM ADMIN. (2009).

⁴⁶ See Carol Vogel, *Museums Fear Lean Days Ahead*, N.Y. TIMES, Oct. 2, 2009, at C1.

⁴⁷ Robin Pogrebin, *New Endowment Chairman Sees Arts as Economic Engine*, N.Y. TIMES, Aug. 8, 2009, at C1 (quoting the National Endowment for the Arts chairman as describing the drop as “pathetic” and “embarrassing”).

⁴⁸ Rohner, *supra* note 13, at 18 (citing Elizabeth Merritt, *Economic Change and the Future of American Museums*, CENTER FOR THE FUTURE OF MUSEUMS, <http://futureofmuseums.blogspot.com/2009/09/economic-change-and-future-of-american.html> (Sept. 25, 2009)).

⁴⁹ Davis, *supra* note 29.

⁵⁰ Rohner, *supra* note 13, at 24 (citing The Brookings Inst., *MetroMonitor: Tracking Economic Recession and Recovery in America’s 100 Largest Metropolitan Areas*, Dec. 2009).

⁵¹ *Id.* at 26 (citing Louise Blouin Media, *Brooklyn Museum Responds to Recession*, ARTINFO (2009), <http://www.artinfo.com/news/story/31161/brooklyn-museum-responds-to-recession>).

⁵² See *supra* note 34.

⁵³ See *supra* note 34; Johnson, *supra* note 41.

The ramifications of a museum closing are far-reaching and negative.⁵⁴ On a business level, employment and tourism suffer. On a cultural level, regional heritage is spread to museums in different areas, the community loses an important educational institution, and the public may be divested of the opportunity to see art. On a personal level, “[t]he decision to close was gut wrenching, in terms of the ramifications to our community and the embarrassment that we had failed in our stewardship,” one museum board director said.⁵⁵ At closing, the collections may be stored, flash-sold to private collectors below market value, and possibly seized by creditors as payment for the museum’s outstanding debt. When the Fresno Metropolitan Museum closed in January 2010, it still owed creditors four million dollars after selling off non-art assets.⁵⁶ The museum plans to sell its art collections at auction houses across the country to pay the remaining debt.⁵⁷

Simultaneous with the drop in the stock market is the rise in museum deaccessioning, or at least proposed deaccessioning. Michael Rush, former director of the Rose Art Museum, explained that “museums are looking more closely at every aspect of their operations, including the possibility of raising funds from deaccessioning.”⁵⁸ From 2009 through 2010, museums sold or proposed to sell objects to survive the financial crisis,⁵⁹ fix a leaky roof that forced collections into storage,⁶⁰ and pay creditors.⁶¹ When other museums closed their doors permanently,⁶² these museums proposed to sell objects in their collections to stay open. Though controversial, deaccessioning is both legal and ethical, as discussed below, and should be embraced as a tool for museum survival.

⁵⁴ But see Tyler Green, *Failure Is an Option*, MODERN ART NOTES, (Jan. 5, 2009, 11:06 AM), available at http://www.artsjournal.com/man/2009/01/failure_is_an_option/htmp (quoting arts commentator Tyler Green arguing that “if an institution . . . can’t operate effectively enough to stay open, it should close”).

⁵⁵ Nazarov, *supra* note 34. The Bellevue Museum later reopened after refocusing its collection. *Id.*

⁵⁶ George Hostetter, *Met Plans Art Sales Despite Objections*, THE FRESNO BEE, Mar. 25, 2010.

⁵⁷ *Id.*

⁵⁸ Rohner, *supra* note 13, at 27 (citing Michael Rush, Dir. of the Rose Art Museum, Statement from Michael Rush Regarding the Impending Closing of the Museum, (Feb. 2, 2009) (transcript available at <http://www.savetherose.org/presidentletter.php>)).

⁵⁹ Randy Kennedy, *National Academy Sells Two Hudson River School Paintings to Bolster its Finances*, N.Y. TIMES, Dec. 6, 2008, C1 (explaining that selling two paintings was the “only way for the 183-year-old National Academy, whose finances have long been troubled, to survive and to exhibit more actively one of the country’s largest collections of American art”).

⁶⁰ See Stephan Salisbury, *Selling Art Reaping Resentment: The Eakins Affair Shows Risks of “Deaccessioning,”* PHILA. INQUIRER, Mar. 11, 2007, at A1 (describing Fisk University’s attempt to sell two Stieglitz paintings in storage because of gallery roof leaks).

⁶¹ See, e.g., Peggy McGlone, *Treasured Map’s Sale Charts Course of Discord: N.J. Historical Society Puts Rare Item on the Auction Block to Pay Down Its Debt*, THE STAR-LEDGER (Newark), Jan. 13, 2011, News, at 1 (explaining that the museums sold a rare map for \$2.1 million to offset \$2.6 million in debt).

⁶² See *supra* note 34 and accompanying text.

III. LEGAL STRUCTURE OF MUSEUMS AND THE FIDUCIARY DUTIES OF MUSEUM BOARD MEMBERS⁶³

A. CHARITABLE TRUSTS AND NON-PROFIT CORPORATIONS

Museums are non-profit organizations subject to state common law, trust and corporate law, and the tax code.⁶⁴ Museums are typically formed as either charitable trusts⁶⁵ or non-profit corporations.⁶⁶ Whether established in trust or corporate form, museum boards sell assets,⁶⁷ earn profits,⁶⁸ and owe duties of care and loyalty to the public.⁶⁹ Deaccessioning implicates a museum board's duties of care and loyalty. If a museum board member breaches the duties of care and loyalty by deaccessioning an object, the state attorney general has the power to bring an action on behalf of the public. Whether a museum board has breached a duty depends on the standard to which the museum board is held, either to the high standards of a private trustee or the lower standard of a corporate director. Courts have yet to establish which standard should apply to museum boards.⁷⁰ Museum boards should be held to a two-tiered standard: a lower standard should be applied to day-to-day museum management and a higher standard should be applied to transactions involving investment of museum funds.

1. *The Charitable Trust Museum*

The charitable trust museum is a type of traditional private trust. A private trust is established when a trustor appoints a trustee to manage property for the benefit of a third party.⁷¹ The trustee's management of the property is not subject to oversight by a state or federal body. Instead, the trustee's management may go unchecked as the beneficiary is often an individual.⁷² As a result, trust law has established fiduciary duties that control the trustee's administration, care, management, and investment of the trust.⁷³ A traditional trustee is personally liable to the beneficiary for breach of a fiduciary duty.⁷⁴ In determining whether there has been a breach of duty, the court holds traditional trustees to the highest standard of care.⁷⁵

⁶³ For the purposes of this Note, "museum board members" is a general term encompassing both museum trustees and directors.

⁶⁴ See Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 416 (2003).

⁶⁵ For example, the Getty Trust, which runs the Getty Museum and the Getty Villa. THE J. PAUL GETTY TRUST, <http://www.getty.edu> (last visited Sept. 11, 2010).

⁶⁶ See Gerstenblith, *supra* note 64, at 411.

⁶⁷ MARIE C. MALARO, *Deaccessioning—The American Perspective*, in A DEACCESSION READER, *supra* note 15, at 38, 41.

⁶⁸ See Gerstenblith *supra* note 64, at 412.

⁶⁹ Lauren McBrayer, *The Art of Deaccession: An Ethical Perspective*, ALI-ABA COURSE OF STUDY MATERIALS: LEGAL PROBLEMS OF MUSEUM ADMINISTRATION (2005).

⁷⁰ Fincham, *supra* note 3, at 40.

⁷¹ MARIE C. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 6 (2d ed. 1998).

⁷² *Id.* at 10.

⁷³ RESTATEMENT (SECOND) OF TRUSTS § 186 (1959).

⁷⁴ See MALARO, *supra* note 71, at 6.

⁷⁵ In *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928), Judge Cardozo explained that "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

To be a charitable trust, trust law requires that a trustee hold property for a charitable purpose in the interest of a non-discrete group of beneficiaries.⁷⁶ A museum is established as a charitable trust in a trust instrument or indenture, which appoints the trustees, describes the trust property, and promulgates the charitable purpose. For example, the Getty Trust Indenture establishes that the charitable purpose is to found a museum, gallery, and library “for the diffusion of artistic and general knowledge.”⁷⁷ The indenture gives museum trustees the power to sell or dispose of the trust property and to use the proceeds to acquire new objects or to add to the Endowment Fund.⁷⁸ The museum purpose as stated in the trust document may not be changed. In extreme circumstances, the courts may allow a trustee to circumnavigate a testatrix’s wishes under the doctrines of cy pres, deviation, or precatory language.⁷⁹

As trustees, museum board members must uphold and protect the purpose of the museum as described in the trust document.⁸⁰ Museum board members are entitled to compensation from museum trust property for their services as trustees.⁸¹ Museum board members also have two broad fiduciary duties—care and loyalty.⁸² The duty of care requires board members to (1) administer the museum in the interest of effectuating the museum’s purpose, (2) delegate powers to museum management prudently, (3) use reasonable care and skill to preserve the museum and its collections, (4) use reasonable care and skill to make the museum and its collections productive, and (5) incur expenses on a reasonable basis.⁸³ The duty of loyalty requires museum board members to refrain from conflicts of interest, for instance, by avoiding interested transactions, by refraining from making interested decisions, and by making the amount and status of the endowment transparent.⁸⁴

2. *The Non-Profit Corporation Museum*

Most museums are non-profit corporations, a type of business corporation, rather than charitable trusts.⁸⁵ A for-profit business corporation, in the form of the board of directors, holds and manages the assets of the business for the benefit of the stockholders.⁸⁶ These corporate boards are subject to state and government oversight under corporate law.

⁷⁶ See RESTATEMENT (SECOND) OF TRUSTS §§ 348, 368 (1959) (defining a charitable purpose to include the relief of property, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, or another purpose that benefits the community). Museums have the charitable purposes of advancement of education and beneficial accomplishments for the community.

⁷⁷ *Trust Indenture, THE J. PAUL GETTY TRUST*, <http://www.getty.edu/about/governance/pdfs/indenture.pdf> (last updated Oct. 20, 2004).

⁷⁸ *Id.* at para. 8. Trustee compensation and reimbursements must come from the Endowment Fund and cannot come from admission fees income. *Id.* at para. 16.

⁷⁹ See MALARO, *supra* note 71, at 138, 143.

⁸⁰ *Id.* at 6.

⁸¹ RESTATEMENT (SECOND) OF TRUSTS § 390 (1959).

⁸² See MALARO, *supra* note 71, at 19–20.

⁸³ RESTATEMENT (SECOND) OF TRUSTS § 379 cmt. a (1992). These are the major traditional trustee duties of care as applied to museum trustees.

⁸⁴ *Id.* These are the major traditional trustee duties of loyalty as applied to museum trustees.

⁸⁵ MALARO, *supra* note 71, at 4.

⁸⁶ *Id.* at 8.

Stockholders also oversee and control the corporate board of directors. Stockholders have the power to vote directors on or off, buy and sell controlling shares of stock, and vote on mergers, acquisitions, and management of the company.⁸⁷ Like a traditional trustee, corporate directors have certain fiduciary duties to manage, administer, and invest the corporate assets for the benefit of the shareholders.⁸⁸ Because corporate boards are subject to oversight and control by shareholders, government regulation, and the market, however, the individual directors are held to a much lower standard of duty.⁸⁹ The business judgment rule protects the decisions of corporate directors in the absence of negligence, self-dealing, and fraud.⁹⁰

A non-profit corporation is a hybrid between a business corporation and a trust, and it must have a charitable purpose.⁹¹ A non-profit corporation has characteristics of a corporation because it is subject to business compliance, business rules, and requires multifaceted management, such as the hiring and firing of staff and the management of multiple real properties.⁹² A non-profit corporation also has the characteristics of a charitable trust because property is held for the pursuit of a charitable purpose to benefit the public.⁹³

As required by state corporation law, non-profit corporations must file articles of incorporation with the secretary of state to become incorporated.⁹⁴ Like a trust document, the articles of incorporation also establish the charitable purpose of the museum. For example, Los Angeles County Museum of Art's charitable purpose is "to encourage activities and promote education in the field of art in aid of and in connection with the Los Angeles County Museum of Art."⁹⁵ Meanwhile the articles of incorporation of the Boise Art Association promulgate a more specific charitable purpose of "receiving and expenditure of principal and interest to promote the well-being of mankind by charitable, educational, literary endeavors and publications to the end of encouraging the development of artists and interest in art," and to stimulate art appreciation.⁹⁶

The charitable purpose as described in a museum's articles of incorporation cannot be amended without the written approval of a majority of the incorporators, if the incorporators are not directors, no directors have been elected, and the corporation has no members.⁹⁷ If a

⁸⁷ *Id.* at 9.

⁸⁸ *Id.* at 8.

⁸⁹ *Id.*

⁹⁰ See Randy Kennedy, *Buffalo's Pain: Giving Up Old Art to Gain New*, N.Y. TIMES, Mar. 14, 2007, at E1 (explaining that when the Albright-Knox trustees voted to deaccession of part of its collection, opponents filed an injunction with the New York State Supreme Court). See also *Dennis v. Buffalo Fine Arts Acad.*, 836 N.Y.S.2d 498, 498 (Sup. Ct. 2007) (dismissing the action because the directors had acted in good faith and their decision was protected by the business judgment rule).

⁹¹ See MALARO, *supra* note 71, at 9–10.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See, e.g., CAL. CORP. CODE § 5120 (2009).

⁹⁵ L.A. CNTY. MUSEUM OF ART, RESTATED ARTICLES OF INCORPORATION OF MUSEUM ASSOCS., Ex. A, p.1 (1994).

⁹⁶ BOISE ART MUSEUM, ARTICLES OF INCORPORATION OF THE BOISE ART ASS'N, art. II (1961).

⁹⁷ CAL. CORP. CODE § 5810(a) (2009).

museum elected a board or has members, amendments to the purpose of the museum may not be made without the approval of the board, the members, and any other persons as required by the originally filed articles of incorporation.⁹⁸ Museum member approval is therefore required to change the museum's purpose as described in the articles of incorporation.⁹⁹

B. STANDARDS FOR FIDUCIARY DUTIES OF MUSEUM BOARDS

Case law has not settled on the standard to which the conduct of museum board members should be held.¹⁰⁰ Private trustees are held to the highest standards.¹⁰¹ Corporate directors are held to much lower standards.¹⁰² Secondary sources and sparse case law tend to hold museum board members—whether it is a charitable trust museum or non-profit corporate museum—to lower standards closer to that of a corporate director with exceptions for trust fund investment and collections management. In the end, the argument comes down to whether museum board members should be held to higher standards because of their fiduciary duties to the public or to lower standards because their management roles are indistinguishable from their business corporation counterparts.¹⁰³ As described below, museum board members should be held to a two-tiered standard of care.

First, no matter what standard is settled on, both forms of museums should be held to that same standard because both function in the same way, have similar purposes, provide the same services, and follow the same professional codes of ethics. Additionally, courts tend to overlook any distinction between the two.¹⁰⁴

1. Tier One: Day-to-Day Management

In everyday transactions, such as running the museum and managing staff and property, museum board members should be held to the same lower standard of care as business corporate directors, which would allow them more discretion. Because a museum board member's day-to-day transactions are more similar in scope and purpose to those of a corporate director than to those of a private trustee, museum board members should

⁹⁸ *Id.* § 5811.

⁹⁹ See BOISE ART MUSEUM, *supra* note 96, at art. VII (1961) (stating that the Boise Art Museum requires that “issued membership cards . . . are non-transferable and such membership is regulated by the by-laws of the museum”).

¹⁰⁰ See Gerstenblith, *supra* note 64, at 417; Gordon Marsh, *Governance of Non-Profit Organizations: An Appropriate Standard of Conduct for Trustees and Directors of Museums and Other Cultural Institutions*, 85 DICK. L. REV. 607, 609–13 (1980–81); HOWARD L. OLECK & MARTHA E. STEWART, *NONPROFIT CORPORATIONS, ORGANIZATIONS & ASSOCIATIONS* 878 (Prentice Hall, 6th ed. 1994).

¹⁰¹ See Gerstenblith, *supra* note 64, at 417.

¹⁰² See *id.* at 417–18.

¹⁰³ See *Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (D.D.C. 1974) (holding that the trustee of a charitable organization should be held to the standard of business corporation directors and receive protection from the business judgment rule because the actions of both are indistinguishable from each other). *But see* Gerstenblith, *supra* note 64, at 419–20 (noting that some commentators argue that “since museum managers perform the same function, regardless of whether the museum is formally organized as a charitable trust or as a nonprofit corporation, they should be held to the trust fiduciary standard.”).

¹⁰⁴ MALARO, *supra* note 71, at 4–5.

be held to the same standards as their “‘pure’ corporate counterparts.”¹⁰⁵ In a Washington D.C. district court case oft cited for non-profit liability and commonly known as the *Sibley Hospital* case, the court opined that because directors of a non-profit corporation are responsible for many areas while private trustees only manage the trust property, non-profit corporate directors should be held to a “less stringent corporate standard of care.”¹⁰⁶ As a result, a director breaches a duty of care by mismanaging the trust with gross negligence.¹⁰⁷ Additionally, a director breaches a duty of loyalty by permitting or participating in a self-dealing transaction with an entity in which the director has a significant interest or degree of control and the director fails to make full disclosure of that relationship.¹⁰⁸ The court also opined that an interested director, in addition to full disclosure, should refrain from participating in an interested transaction at all.¹⁰⁹ Applying this reasoning, the court found that the hospital directors in the case had breached their duties of care and loyalty by failing to adequately oversee the financial transactions, failing to ensure proper financial procedures, failing to disclose their own interests in entities the hospital was transacting with, and permitting and partaking in those transactions.¹¹⁰

Support for museum board member discretion is also found in the nature of their day-to-day duties. The museum enabling instrument, such as the trust document or corporate filing, and museum by-laws establish actual and implied duties necessary to carry out the stated purpose of the museum.¹¹¹ Marie C. Malaro, an expert in and professor of museum management, ethics, and law,¹¹² posited that because museum trustees have both actual and implied duties, there should be a certain freedom of discretion in their actions.¹¹³

Museum trustee discretion should be protected the same way business corporate discretion is protected under the business judgment rule. The business judgment rule protects corporate decisions from court supervision, so long as those decisions are made in the absence of fraud, self-dealing, and waste. In a Connecticut state case, the court held that decisions made by charitable trust trustees are protected in the absence of abuse.¹¹⁴ Therefore, when the trustees of the Hill-Stead Museum voted to close the museum and failed to use “absolute discretion” to determine whether there was “no sufficient interest to warrant maintaining it,” as was required by the trust document, the trustees had abused their discretion.¹¹⁵ The museum

¹⁰⁵ *Stern*, 381 F. Supp. at 1013.

¹⁰⁶ *Id. Contra id.* at 1019 (discussing the “severe obligations” imposed on non-profit corporate trustees because they are unregulated by public authority, not required to file financial reports, and established in perpetuity).

¹⁰⁷ *Id.* at 1013.

¹⁰⁸ *Id.* at 1014.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1015–16.

¹¹¹ MALARO, *supra* note 71, at 10.

¹¹² See GEORGE WASHINGTON UNIVERSITY DISTANCE EDUCATION @ MUSEUM STUDIES, COURSE DESCRIPTIONS AND FACULTY, <http://www.gwu.edu/~mstd/DL%20site/prospect-acad.htm#faculty> (last visited Sept. 12, 2010).

¹¹³ MALARO, *supra* note 71, at 11.

¹¹⁴ *Conway v. Emeny*, 139 Conn. 612, 619 (1953).

¹¹⁵ *Id.* at 619–20.

trustees' decision was not protected from court supervision because they abused the absolute discretion devised to them from the testatrix.

The business judgment rule should protect a museum's good faith decision to deaccession an object for the purpose of keeping a museum viable. This was established in *Dennis v. Buffalo Fine Arts Academy*, where the court held that a good faith decision by non-profit corporate directors to deaccession 200 works of art, necessary for the continued existence of the museum, was unreviewable by the court under the business judgment rule.¹¹⁶ The court found that the directors' decision was made in good faith and was a reasonable and honest exercise of judgment because the decision to deaccession was made after the board met three times over a span of four months to discuss the merits of the deaccession and the overall re-focusing strategy of the museum. Moreover, the board held a special meeting at the request of the museum members.¹¹⁷ The fact that the ex-officio museum directors were not notified of the decision until the last meeting and that the museum board overturned the museum members' vote to take 145 objects off the deaccession list did not make the decision a bad faith, unreasonable, or dishonest decision.¹¹⁸

Prior to *Dennis*, the New York attorney general brought mismanagement allegations against the Museum of the American Indian trustees for "questionable accession and deaccession practices."¹¹⁹ Before the case proceeded in court, however, the parties stipulated to a collections management policy that required all future deaccession decisions to be approved by the museum board of trustees.¹²⁰

Some courts, however, have broadly stated that the stringent trust law standards, and not business corporate standards, should be applied to non-profit corporate directors. In *Holt v. College of Osteopathic Physicians*, a California court applied trust law, not corporate law, to a charitable corporation to determine that a minority trustee of a non-profit corporation had standing to sue the majority trustees.¹²¹ Additionally, by actively changing the name and type of medical education from that of osteopathy to allopathy, the trustees had breached the purpose of the non-profit corporation as established in the articles of incorporation.¹²²

2. Tier Two: Management of Museum Investments and Funds

While museum board members' day-to-day management of the museum should be held to the lower business-corporate standard, certain other duties should be held to the higher standard applied in *Holt*. Museum

¹¹⁶ *Dennis v. Buffalo Fine Arts Acad.*, 836 N.Y.S.2d 498, 498 (Sup. Ct. 2007).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See MALARO, *supra* note 71, at 16 (citing *Lefkowitz v. Museum of the Am. Indian Heye Found.*, No. 41416/75, Stipulation (N.Y. Sup. Ct. 1975)).

¹²⁰ MALARO, *supra* note 71, at 16–17.

¹²¹ *Holt v. Coll. of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 935–37 (Cal. 1964) (citing Kenneth Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 435–36; RESTATEMENT (SECOND) OF TRUSTS § 348 (1959)).

¹²² *Id.* at 937 (citing that the charitable purpose, as set forth in the articles of incorporation, was the study of osteopathic medicine).

board members hold the funds of a museum in trust for the public, which is a duty that is most similar to a private trustee's duty to hold funds in trust for a beneficiary; therefore, museum board members should be held to the more stringent trust law standard in management and investment of museum funds. Six years after the court in *Holt* applied trust law to give a museum minority trustee standing to sue a museum majority trustee, the court in *Lynch v. John M. Redfield Foundation* applied the prudent investor standard from trust law to the financial investment decisions of non-profit corporate directors.¹²³ Because the assets of a non-profit corporation are "impressed with a trust," non-profit corporate directors act like trustees.¹²⁴ The court explained that because non-profit corporate board members act like trustees in their management of non-profit assets, the board members should be held to the same investment standards as trustees are held to—the prudent investor standard.¹²⁵

Under the prudent investor standard, a trustee has a duty to the beneficiary "to invest and manage the funds of the trust as a prudent investor would in light of the purposes, terms, distribution, and other circumstances of the trust."¹²⁶ Trustees must "exercise reasonable care, skill, and caution" and invest in the context of the "overall investment strategy."¹²⁷ Additionally, trustees must comply with the duties of loyalty and impartiality in investment of trust funds.¹²⁸ This Restatement Third of Trusts rule has been adopted by most states either by codification or enactment of the Uniform Prudent Investor Act ("Act").¹²⁹

The number of factors that a prudent investor should consider when investing trust funds was broadened in the California adaptation of the Act.¹³⁰ A prudent investor should consider economic conditions; the effects of inflation or deflation; the tax consequences of investment strategies; the effect that an individual investment will have on the portfolio; the expected total return from income; needs for liquidity, regularity of income, and preservation of capital; and the investment's relationship to the purpose of the trust.¹³¹ A museum board member held to the prudent investor standard would be liable for imprudent investments and use of invested deaccession proceeds. Additionally, a museum board member would have to consider the museum's financial strategy as a whole to determine how the investment should be managed.

¹²³ *Lynch v. John M. Redfield Found.*, 88 Cal. Rptr. 86, 89 (Ct. App. 1970). Prior to *Lynch*, another California court held that the duty to invest funds for productivity only applies to trusts with income or monetary purposes, but does not apply to trusts for purposes "such as holding and preservation of property for use by others." *Higgins v. City of Santa Monica*, 396 P.2d 41, 44 (1964). The court concluded that trustees holding lands and overlying tidal waters for public use did not have a duty to make the property productive by developing it for oil. *Id.* *Higgins* should not be applied to museums, even though museums "hold" things in public trust. Water and tidal waves are distinguishable from museums and their collections because water and tidal waves can exist without being productive, while a museum needs revenue and income to exist.

¹²⁴ *Lynch*, 88 Cal. Rptr. at 89.

¹²⁵ *Id.*

¹²⁶ RESTATEMENT (THIRD) OF TRUSTS § 90 (2007).

¹²⁷ *Id.* § 90(a).

¹²⁸ *Id.* § 90(c) (2007).

¹²⁹ *Id.* pt. 6 ch. 17, forenote cmt. (2007).

¹³⁰ S.B. 222, 1995 Reg. Sess. (Cal. 1995).

¹³¹ CAL. PROB. CODE § 16047(c) (2007).

A two-tiered standard for museum board members will provide for (1) protection of a trustee's decision to deaccession and (2) strict accountability for the use of and investment of deaccession funds.

IV. CURRENT REGULATION OF DEACCESSIONING

A. STATE REGULATION OF DEACCESSIONING

New York is the only state with a state-wide deaccessioning policy.¹³² The policy applies to museums chartered under the Board of Regents and requires that deaccessioning be “consistent with [museums’] corporate purposes and mission statement” and that museums ensure that deaccession proceeds are “for the acquisition, preservation, protection or care of collections” and prohibits museums from using deaccession funds for operating expenses.¹³³ In 2008, The New York Board of Regents Education Department Cultural Education Committee, recognizing the widespread effect of the financial crisis on state museums, proposed an emergency amendment¹³⁴ that would allow museums to pay outstanding debt with deaccession proceeds if the museum could show that “the sale or transfer is necessary to pay outstanding debt that would otherwise threaten the ability of the institution to continue to operate and carry out its mission.”¹³⁵ The Cultural Education Committee recognized the following:

In the current financial downturn, museums face deficits that threaten to cancel programs, cut hours and close doors. A large deficit could threaten a museum's existence and send the trustees to court for bankruptcy protection or other disposition, which could result in a court-directed sale of all or part of a museum's collection to satisfy the museum's outstanding debt.

We believe current Regents Rules on collections are inflexible if a museum faced a sudden, unexpected and critical financial reversal. We don't want a major museum to close, and don't want to lose collections held in the public trust to debt.¹³⁶

The Board of Regents adopted the emergency amendment in December 2008; the adopted version, however, actually prohibited the use of deaccession proceeds for outstanding debt or capital expenses.¹³⁷ Instead of being codified into New York code, The Board of Regents, in September, 2010, voted to let the prohibitive emergency protections sunset in October

¹³² Rohner, *supra* note 13, at 35.

¹³³ N.Y. COMP. CODES R. & REGS. Tit. 8, § 3.27(c)(6) (2011) (effective Oct. 8, 2010).

¹³⁴ Memorandum from Jeffrey Cannell, State Educ. Dept. on Emergency Amendment of Regents Rule § 3.27 Relating to Museum Collections Mgmt. Policies to the Cultural Educ. Comm. (Dec. 1, 2008), available at <http://www.regents.nysed.gov/meetings/2008Meetings/December2008/1208cea3.htm>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ N.Y. COMP. CODES R. & REGS. Tit. 8, § 3.27(c)(6) (2011) (effective until Oct. 8, 2010). See also Memorandum from Jeffrey W. Cannell, Emergency Amendment of Regents Rule § 3.27, Relating to Museum Collections Mgmt. Policies to the Cultural Educ. Comm., (Aug. 26, 2010), available at <http://www.regents.nysed.gov/meetings/2010Meetings/September2010/0910cea1.pdf>.

2010 in response to museum concerns.¹³⁸ While the prohibition against applying deaccession proceeds toward debt has expired, New York museums are still prohibited from applying deaccession proceeds toward operating costs.¹³⁹

The Board of Regents has also established an ad hoc advisory committee on deaccessioning to make recommendations regarding New York deaccessioning policies.¹⁴⁰ In January 2011, the ad hoc committee proposed an amendment to the current deaccession policy that would provide nine specific criteria under which a museum could deaccession a piece and that would require all deaccession proceeds to be placed in a separate fund used only for future acquisitions or the “direct preservation, protection or care of collections.”¹⁴¹

The New York Assembly also took up deaccessioning in the proposed Assembly Bill 6959. The Bill, which would have regulated all New York museums (whereas the Board of Regents policy only affects board-chartered museums) essentially would have turned the Board of Regents emergency deaccessioning amendment into state law.¹⁴² The Bill, introduced by Assemblyman Richard Brodsky and Senator José Serrano, was a reaction to recent deaccessions in New York and would have made it illegal to deaccession for any reason other than the following: (1) the object is inconsistent with the mission of the museum, (2) the object fails to retain its identity, (3) the item is redundant, (4) the object’s preservation and conservation needs are beyond the capacity of the museum, (5) disposal of the object would refine the collection, (6) the object is inauthentic, (7) the object is being repatriated to a rightful owner, (7) the object is being returned to a donor because a restriction can no longer be satisfied, or (8) the object is harmful to people or other collection objects.¹⁴³ The bill would also have made it illegal to use deaccession proceeds for “traditional and customary operating expenses.”¹⁴⁴

The proposed Bill drew sharp criticism from the arts community.¹⁴⁵ Museum directors were concerned that the Bill would be too constraining

¹³⁸ Marlon Bishop, *Art Deaccessioning: Right or Wrong?*, WNCY (Oct. 20, 2010), <http://culture.wnyc.org/articles/features/2010/oct/20/deaccessioning-right-or-wrong/>; Robin Pogrebin, *Criticism Flies After State Eases Ban on Art Sales*, N.Y. TIMES, Oct. 5, 2010, at C1.

¹³⁹ N.Y. COMP. CODES R. & REGS. Tit. 8, § 3.27(c)(6) (2011) (effective Oct. 8, 2010).

¹⁴⁰ Pogrebin, *supra* note 138.

¹⁴¹ Memorandum from Jeffrey Cannell, State Educ. Dept. on Amendment of Regents Rule § 3.27, Relating to Museum Collections Mgmt. Policies (Jan. 24, 2011) (as of printing, the Board of Regents had not voted on the proposed amendment).

¹⁴² See Assemb. B. 6959, 2009–10 Leg., 232nd Reg. Sess. (N.Y. 2009).

¹⁴³ *Id.*

¹⁴⁴ *Id.* Note that the original version of the bill contained a provision requiring museums to “make a good faith effort to sell or transfer such [deaccessioned] item to another museum in New York State. If such sale or transfer cannot be accomplished, a museum must make a good faith effort to sell or transfer such item to another public museum.” Lee Rosenbaum, *Channeling Max Anderson: NY State’s Deaccession Bill Rewritten*, ARTSJOURNAL WEBLOG (June 23, 2009 2:18 PM), http://www.artsjournal.com/culturegrl/2009/06/ny_states_deaccession_bill_rew.html.

¹⁴⁵ *CONTRA MUSEUM ASS’N OF N.Y., REPORT TO THE FIELD: DEACCESSIONING BILL (A6959–A/S4584–A)*, 4 (2009), available at <http://www.manyonline.org/pdfs/Deaccessioning-Survey-Report.pdf> (reporting that in a survey of thirty-seven New York museums regarding the proposed prohibition of using deaccession funds to offset operating costs, eighteen museums strongly supported the bill, fourteen museums supported it, three did not support it, and one strongly did not support it).

during the financial crisis.¹⁴⁶ The director of the Guggenheim criticized the bill for stifling “intellectual freedom and differences of taste and opinion” by making deaccession policies a matter of law.¹⁴⁷ The director of the Whitney Museum of Art explained that the Bill “did not allow for the philosophical, aesthetic decision that is fundamental to the curatorial exercise of judgments of quality and improving a collection.”¹⁴⁸ The director of the Albany Institute of History & Art argued that in the wake of legislative budgetary slashes for the arts, the legislature was “seeking to choke off another avenue of income with this unfunded mandate.”¹⁴⁹ The same director went on to ask if it “[made] sense to prevent the deaccessioning of works which then won’t be enjoyed by the public because the institution that houses them can’t afford to keep its doors open?”¹⁵⁰

Other museums, in response to a Museum Association of New York survey about the Bill, asked “[s]o what does an organization do if its operating costs cannot be met. If you can’t look after your collection or parts of it, then selling it might actually be a better solution for the collection!”¹⁵¹ Another museum explained that “[t]here are items in our collection that do not relate to the museum’s mission. It would be helpful for us to deaccession some of these items and use the funds to pay for the operating costs of storing the collection in an offsite storage facility.”¹⁵² Arts groups also criticized the Bill for failing to consider an organization’s collecting policy or financial status.¹⁵³

In response to the criticism from museums and concerns over the widespread affect on various institutions including zoos, botanical gardens, and aquariums, the Bill sponsors withdrew support in August 2010. The Bill has no foreseeable future.¹⁵⁴

B. MUSEUM ASSOCIATION REGULATION OF DEACCESSIONING

Nationally, museum deaccessioning is largely guided by ethical standards. Museum ethics are promulgated in professional codes that define and describe the “correct actions for persons working in a specialized profession.”¹⁵⁵ These codes are formulated by two major entities: the American Association of Museums (“AAM”) and the Association of Art Museum Directors (“AAMD”).¹⁵⁶

¹⁴⁶ Robin Pogrebin, *Museums and Lawmakers Mull Sales of Art*, N.Y. TIMES, Jan. 15, 2010, at C31.

¹⁴⁷ Robin Pogrebin, *Institutions Try to Slow Bill to Curb Sales of Art*, N.Y. TIMES, June 23, 2009, at C1.

¹⁴⁸ Robin Pogrebin, *Permanent Collections May Not Be So Permanent*, N.Y. TIMES, Jan. 27, 2011, at C1.

¹⁴⁹ Christine Miles, *Legislature’s Meddling Hurts State’s Museums*, ALBANY TIMES UNION, July 5, 2009, at B1.

¹⁵⁰ *Id.*

¹⁵¹ MUSEUM ASS’N OF N.Y., *supra* note 145, at 4.

¹⁵² MUSEUM ASS’N OF N.Y., *supra* note 145, at 3.

¹⁵³ Pogrebin, *supra* note 147.

¹⁵⁴ Robin Pogrebin, *Bill to Halt Certain Sales of Artwork May Be Dead*, N.Y. TIMES, Aug. 11, 2010, at C1.

¹⁵⁵ Gary Edson, *Ethics*, in MUSEUMS ETHICS 9 (Gary Edson ed. 1997).

¹⁵⁶ See generally AM. ASS’N OF MUSEUMS, ACCREDITATION PROGRAM: ANNUAL STATISTICS AT-A-GLANCE (2010), available at <http://www.aam-us.org/museumresources/accred/upload/2010-Accred->

Neither the AAM nor the AAMD prohibit outright the disposal of art;¹⁵⁷ both, however, provide ethical and procedural guidelines for deaccessioning. Museums are under an immense amount of professional pressure to join and maintain membership in these associations.¹⁵⁸ As members, museums must abide by the associations' ethical codes. A violation of these codes has severe professional consequences, as discussed below.

The AAM is a membership association made up of all types of museums in the US, Canada, and Mexico. In its Code of Ethics for Museums, AAM requires museums to "responsibly dispose" of objects by (1) conducting disposal "in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials" and (2) disposing of collections through sale, trade, or research "solely for the advancement of the museum's mission."¹⁵⁹ Proceeds from deaccession sales may only be used for the acquisition of and direct care of collections.¹⁶⁰ "Direct care of the collections" may mean "general expenses [of] art museums,"¹⁶¹ however, the narrower AAMD, which applies only to art museums, would prohibit such use.

The AAMD is a membership association limited to art museum directors by invitation only. The AAMD's Professional Practices in Art Museums policy regulates deaccessioning by setting forth criteria for selecting objects and use of deaccession proceeds.¹⁶² The policy requires museum board members to make the final deaccession decision and provide full justification for that decision.¹⁶³ Additionally, museums must adopt and follow a written policy that makes deaccession standards as stringent as the acquisition standards.¹⁶⁴ The policy also provides a proposed deaccession guideline that lists acceptable reasons to deaccession an object. Finally the policy requires that "funds (principal and interest) received from the disposal of any deaccessioned work of art must be used only for the acquisition of works of art."¹⁶⁵

Violation of the AAM ethical code may result in loss of accreditation.¹⁶⁶ Violation of the AAMD ethical code by any museum "may expose that institution to sanctions, such as suspension of loans and shared

Annual-Stats-At-A-Glance.pdf (explaining that annual membership is .1 percent of a museum's operating budget and that museum accreditation requires museums to customize their ethics codes so as to be consistent with AAM's standards. As of January 2010, there were 779 accredited museums, 42 percent of which were art museums.).

¹⁵⁷ See AAM CODE, *supra* note 17; AAMD PROF'L PRACTICES, *supra* note 17. See also McBrayer, *supra* note 69, at A(2).

¹⁵⁸ Rohner, *supra* note 13, at 40.

¹⁵⁹ AAM CODE, *supra* note 17.

¹⁶⁰ AAM CODE, *supra* note 17.

¹⁶¹ Rohner, *supra* note 13, at 19.

¹⁶² AAMD PROF'L PRACTICES, *supra* note 17.

¹⁶³ AAMD PROF'L PRACTICES, *supra* note 17.

¹⁶⁴ AAMD PROF'L PRACTICES, *supra* note 17.

¹⁶⁵ AAMD PROF'L PRACTICES, *supra* note 17. The AAMD also published a deaccession position paper, reiterating that deaccession proceeds may only be used for future acquisitions and adding that proceeds are never to be used "as operating funds, to build a general endowment, or for any other expenses." ASS'N OF ART MUSEUMS, ART MUSEUM AND THE PRACTICE OF DEACCESSIONING (2007), available at <http://www.aamd.org/papers/documents/FINALPositionPaperDeaccessioning.doc>.

¹⁶⁶ AAM CODE, *supra* note 17.

exhibitions by AAMD members.”¹⁶⁷ Members and critics of AAM and AAMD ethics codes have felt the pressure to adhere to and uphold the standards,¹⁶⁸ sometimes almost blindly.¹⁶⁹ In an ironic twist, once a museum closes, the AAM is no longer concerned about the ethical standards the museum practices and allows the museum board and state attorney general to make all disposal decisions.¹⁷⁰

Ethical standards, by their nature, should evolve with the prevailing general opinion.¹⁷¹ Since 1993, financial conditions, museum values, and opinions toward deaccessioning have changed considerably.¹⁷² Despite those changes, the AAM and the AAMD have failed to update their deaccessioning ethics standards.¹⁷³ In January 2010, the AAMD even reaffirmed its strict deaccessioning standards at its annual meeting.¹⁷⁴

Museums and the public interest are harmed by strict ethics standards that remain unchanged despite the recent financial crisis. Violations of such standards carry harsh ramifications. Museums, thus, may be incentivized “to sell works in secret”¹⁷⁵ or resort to other closed-door transactions. Also, museums, despite having large acquisition funds, may be forced to close because of loss of endowment and operating expenses.¹⁷⁶

¹⁶⁷ AAMD PROF'L PRACTICES, *supra* note 17.

¹⁶⁸ See also Sergio Muñoz Sarmiento, *More Deaccessioning Thoughts from Dobrzynski*, THE DEACCESSIONING BLOG (Feb. 1, 2010, 5:30 PM), <http://clancootheartdeaccessioningblog.blogspot.com/2010/01/dobrzynski-on-deaccessioning-great.html> (posting a quote from Judith H. Dobrzynski, after a meeting where the author and former New York Times editor discussed the proposed New York Assembly deaccessioning bill, “it’s sad but true, that several people on both sides of the issues told me that I was ‘brave’ to propose something at odds with the official AAMD/AAM position. It was as if I had voluntarily touched the Third rail of the museum world”); Fincham, *supra* note 3, at 7 (using normative theory to explain that social sanctions on museums that choose to deaccession are too severe); Kennedy, *supra* note 59, (explaining that when the National Academy attempted to sell two paintings to shore up finances and show its collections on a more permanent basis, the AAMD “asked its members to cease lending artworks to the academy and collaborating with it on exhibitions;” the Academy had withdrawn its membership from the AAMD prior to AAMD’s criticism.).

¹⁶⁹ See McGlone, *supra* note 34 (quoting one art museum director who mused that if “the roof is leaking and it’s raining on the collection” she still would not sell a piece of art to fix the roof, citing “professional” tenets). Surely, the AAM and the AAMD professional standards should not force the destruction of an entire collection just to save one piece of art in storage from being sold to fix the roof.

¹⁷⁰ Johnson, *supra* note 41.

¹⁷¹ See, e.g., AAM CODE, *supra* note 17 (stating that codes should evolve “in response to changing conditions, values, and ideas.”).

¹⁷² See *supra* Part II; *infra* Part V.

¹⁷³ See WEIL, *supra* note 15, at 8 (explaining that the AAM, prior to 1993 had never addressed the use of deaccession proceeds). In 1993, amidst “prolonged and furious controversy” it issued the current version. *Id.* The AAM originally proposed that deaccession funds would be limited toward future acquisitions, but arts groups successfully lobbied to have “and for the direct care and management” of the collection included. *Id.*

¹⁷⁴ At the AAMD’s mid-winter meeting in Sarasota, the Deaccessioning Task Force reviewed the association’s deaccession policy. The Task Force debated the policy and then reaffirmed the policy. *Ass’n of Art Museum Dirs. Mid-Winter Meeting Held in Sarasota*, ASS’N OF ART MUSEUM DIRS., 2 (2010),

http://www.aamd.org/newsroom/documents/AAMD2010MidWinterMeetingPressRelease_000.pdf.

¹⁷⁵ Fincham, *supra* note 3, at 4.

¹⁷⁶ See sources cited *supra* note 34.

V. THE HISTORY OF MUSEUMS AS COLLECTORS AND FINANCIAL STRAINS CAUSED BY COLLECTION STORAGE

A museum's primary function is the acquisition, preservation, study of, and dissemination of knowledge from collected items.¹⁷⁷ Collecting, as one scholar said, is the "desire" of the museum.¹⁷⁸ To fulfill its purpose, museums collect from private sellers, auctions, other museums, and archeological sites. Museums also receive objects by gift and bequest.¹⁷⁹ Some museums collect single artists or works from certain artistic periods;¹⁸⁰ others collect hundreds and thousands of different artists from an array of artistic periods.¹⁸¹ While collecting is paramount, museums have over-collected in the past, leading to current financial problems, storage issues, and unfocused collections.

Excessive collecting can be traced to a historical fascination with collection and relaying the human story. Collecting for public viewing started in ancient Greece where people left gifts for the gods in temples and war heroes put on displays of looted wealth to impress followers.¹⁸² During the Middle Ages, people looted ancient tombs to collect treasures and human remains.¹⁸³ During the Renaissance, the Medici family established collecting as a bourgeois activity.¹⁸⁴ The royal families, similar to their Greek predecessors, used their collections of wealth to impress their citizens.¹⁸⁵ The French and Industrial Revolutions shaped modern day collecting by reestablishing a public, non-elitist interest in it.¹⁸⁶

In early American museum history, art museums were established to enlighten, elevate, and educate the public. The museums became huge "temples" to the human story.¹⁸⁷ Every object was sacred, untouchable, and destined to be in the collection forever.¹⁸⁸ This attitude prevailed into the twentieth and twenty-first centuries. Post-World War II era museums were

¹⁷⁷ See, e.g., AAMD PROF'L PRACTICES, *supra* note 17 (requiring that that art museum mission statements include that the main function of a museum is the "acquisition, preservation, conservation, exhibition, scholarly study, and public education" of collections); AAM CODE, *supra* note 17 (requiring that museum mission includes "collecting and preserving, as well as exhibiting and educating with materials not only owned but also borrowed and fabricated for these ends.").

¹⁷⁸ John Elsner, *A Collector's Model of Desire: The House and Museum of Sir John Soane*, in THE CULTURES OF COLLECTING 155 (John Elsner & Roger Cardinal eds., 1994).

¹⁷⁹ In 2008, Los Angeles County Museum of Art acquired four objects from outright gifts, one object using partial gift funds and museum funds, one object by purchase, and four objects by undisclosed means. L.A. CNTY MUSEUM OF ART, <http://www.lacma.org/art/turrell.aspx> (last visited Sept. 7, 2010). From July 2007 to June 2008, the Getty Museum and Trust made sixty-six acquisitions (including single objects and folios of photography), but did not disclose the collection sources in its 2008 Trustee Report. THE J. PAUL GETTY TRUST, THE J. PAUL GETTY TRUST 2008 REPORT, 13 (2008), available at www.getty.edu/about/governance/trustreport/trust_report_08.pdf.

¹⁸⁰ See, e.g., Elsner, *supra* note 178, at 156 (discussing the Sir John Soane Museum in London, which "embodies and freezes for posterity the moment at which collecting (and redeploying a collection) ceases, the moment when the museum begins.").

¹⁸¹ See J. PAUL GETTY TRUST, *supra* note 179, at 13.

¹⁸² See PAUL VAN DER GRIP, PASSION AND PROFIT: TOWARDS AN ANTHROPOLOGY OF COLLECTING 35-41 (2006).

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ TONY BENNETT, THE BIRTH OF THE MUSEUM: HISTORY, THEORY POLITICS 38 (1995).

¹⁸⁶ *Id.* at 39.

¹⁸⁷ STEPHEN E. WEIL, A CABINET OF CURIOSITIES: INQUIRIES INTO MUSEUMS AND THEIR PROSPECTS 87 (1995).

¹⁸⁸ *Id.* at 38.

known for being in the “salvage and warehouse business” because their purposes were to preserve and study human history.¹⁸⁹ Museums continued to widen the scope of their collections to appeal to broader masses and compete with other museums.

Museum collections also expanded for other reasons including mismanagement, variations in public interest, high endowments, and passage of the Federal Revenue Act of 1917, which allowed tax deductible donations thus increasing gifts to museums.¹⁹⁰ Collections also grew as a function of the type of museum they served: more archeological discoveries as cities expanded; more natural history specimens as technologies improved access and discovery; and more modern art as contemporary artists created works.¹⁹¹ Aldrich Contemporary Art Museum Director Harry Philbrick pointed out that when the Aldrich Museum first opened, “it was collecting contemporary artwork, and did so into the mid 1970’s, although it became clear pretty soon after that if we were to remain a museum of contemporary art, it was not really appropriate to keep buying and maintaining a collection, as a collection quickly becomes historic”¹⁹²

Whatever the reason for excessive collecting, it can lead to serious financial strain when collections are never culled. Museums put more acquisitioned objects in storage than on exhibition. Today, approximately 90 percent of an art museum’s collections are in storage.¹⁹³ While stored collections are an important part of a museum’s mission and function as a source of research, education, and lending to other museums,¹⁹⁴ most museums do not take full advantage of them.¹⁹⁵ Stored collections can quickly become a financial burden.¹⁹⁶ Collections in storage require storage space, storage material, security, staff, and documentation.¹⁹⁷ The annual operating cost of one square foot of storage space in 1988 was estimated at thirty dollars.¹⁹⁸ Some objects require conservation and all objects require preservation. Museums spend about 60 percent of their budgets on stored collections when only around 10 percent of the collections are actually

¹⁸⁹ See Gerstenblith, *supra* note 64, at 414.

¹⁹⁰ See SUZANNE KEENE, FRAGMENTS OF THE WORLD: USES OF MUSEUM COLLECTIONS 25–26 (2005).

¹⁹¹ *Id.* at 26; WEIL, *supra* note 187, at 43.

¹⁹² Benjamin Genocchio, *It’s Back to the Future for the Aldrich Museum*, N.Y. TIMES, June 15, 2003, at 14CNI. The museum later deaccessioned its entire permanent collection and disposed of objects by giving them back to artists, donating them to other institutions, and auctioning the rest. *Id.*

¹⁹³ Rohner, *supra* note 13, at 15.

¹⁹⁴ See KEENE, *supra* note 190, at 2.

¹⁹⁵ See Kennedy, *supra* note 59 (explaining that the National Academy owns over 7000 works of art, most of which have never been publicly exhibited). Museums may be able to utilize stored collections by allowing public access. Pedestrianized storage, however, has issues as well: adequate storage cases, costs for staffing display and security, and damage to objects from exposure to elements. KEENE, *supra* note 190, at 127–28.

¹⁹⁶ See Tomislav Sola, *Redefining Collecting*, in MUSEUMS AND THE FUTURE OF COLLECTING 189 (Simon J. Knell ed., 2004); Alex Jacobs, *SLU to Auction 177 Pieces of Art*, WATERTOWN DAILY TIMES (N.Y.), Oct. 20, 2009 (explaining that St. Lawrence University’s Brush Art Gallery is running out of storage space for its works and as a result the museum was forced to auction 177 pieces that had been collected before acquisition standards were enforced).

¹⁹⁷ See Sola, *supra* note 196, at 189.

¹⁹⁸ Rohner, *supra* note 13, at 59 (quoting STEPHEN E. WEIL, MAKING MUSEUMS MATTER 142 (2002)).

preservable.¹⁹⁹ A broader deaccession policy would alleviate the financial burdens of stored collections.

VI. A PROPOSED DEACCESSION POLICY

This Note proposes that the ethics codes for museums should be amended to allow museums to deaccession objects for financial reasons and to apply deaccession proceeds more freely. Recent museum cut-backs and secretive deaccessioning projects breach museums' charitable purposes and museum board members' duty to hold museum collections for the benefit of the public. Museums are caught between the pressure to remain temples to the human story and the lure of selling objects to relieve financial strain. The following proposed deaccession policy would permit museums to deaccession for financial reasons. Moreover, it would allow museums to apply, in limited means, deaccessioning proceeds to operating costs. This proposed policy should be adopted by AAM and the AAMD as an amendment to their current ethics codes.

The pressure to keep everything and to use deaccession proceeds only toward purchasing additional objects derives largely from traditional views of museums that have been codified within professional ethics codes of AAM and AAMD. These codes should be amended because they do not reflect the current financial trends and changes in museum missions. The deaccession debate at the AAMD 2010 winter conference, the roundtable discussion of the proposed New York deaccession bill in January 2010, and the Bill's subsequent death in August 2010 confirm that the current strict standard is not backed unanimously by the arts community and that members of the AAMD are open to amendment.²⁰⁰ Instead of exiling museums for deaccessioning for financial reasons and forcing other museums to cancel loans to and exhibits with the exiled museum,²⁰¹ the AAMD and AAM should work with their members to form and enforce a deaccessioning policy that will protect the public trust by helping museums stay open.

A. RIGOROUS EXAMINATION AND GREAT PRUDENCE²⁰²

Museums have largely adopted and followed the AAMD and the AAM standards requiring that the decision to deaccession be made thoughtfully and with full justification. This should be a fixture of the proposed policy because it ensures critics and the public that the deaccession was not a quick "fix-it." A requirement that deaccession recommendations start with the curator of the collection and finalize with approval from the museum board would ensure that any interested decision made to cover a budgetary mistake or increase a salary is cleansed with non-interested justification at every level. Furthermore, the recommendation and decision to deaccession an object may happen before the manner of disposal is determined. An

¹⁹⁹ Sola, *supra* note 196, at 189 (showing that this statistic includes all types of museums).

²⁰⁰ See *supra* note 174 and accompanying text; Pogrebin, *supra* note 146.

²⁰¹ See *supra* note 168.

²⁰² AAMD PROF'L PRACTICES, *supra* note 17, at para. 23.

object that is not sold, but instead gifted, exchanged, or destroyed, will not reap any proceeds, will not affect any salaries, but will alleviate financial strain.

B. DETERMINING WHICH OBJECTS TO DEACCESSION AND DISPOSING OF OBJECTS FOR FINANCIAL REASONS

Currently, there are several accepted reasons for deaccessioning an object that should be included in the proposed deaccession policy. These AAMD criteria promote the improvement of museum collections by allowing the disposal of objects that are of poor quality, duplicates, or redundancies; that have questionable provenance or title; are inauthentic or whose identity is false or fraudulent; that are damaged beyond reasonable repair; or that are “no longer consistent with the mission or collecting goals of the museum.”²⁰³

Some museums have added criteria that may reflect the current necessity to deaccession more freely. The proposed policy should also include these additional criteria, thus allowing the deaccessioning of objects if they have “little value in the Museum’s collection,”²⁰⁴ “the object lacks sufficient aesthetic merit or art historical importance to warrant retention,”²⁰⁵ or the object is “unduly difficult or impossible to care for or store properly.”²⁰⁶

When a museum culls its collections to find redundant or unduly difficult to-care-for objects because the museum’s shrunken endowment can no longer support excessive storage facilities, then, by default, a museum is deaccessioning for financial reasons. Deaccessioning an object for financial reasons is different than using the proceeds of a disposed object for operating expenditures. An object deaccessioned for financial reasons is being disposed of to alleviate its financial burden on the museum. The 90 percent of collections that are in storage are expensive and time-consuming to take care of. If the museum has the freedom to sell the objects, the objects may actually be returned to public view at a more appropriate institution, and museums can defray strains of costly storage.

C. HOW OBJECTS SHOULD BE DISPOSED OF

Other public institutions should have the first chance to purchase or trade for deaccessioned objects. This can be effectuated in an online database similar to the one in the proposed New York deaccessioning bill or the one used by the Indianapolis Museum of Art.²⁰⁷ The Indianapolis Museum of Art’s website describes which piece of art is being sold, the reason it is being sold for, and links any new pieces purchased using the

²⁰³ AAMD PROF’L PRACTICES, *supra* note 17, at app. B.

²⁰⁴ MET. MUSEUM OF ART, COLLECTIONS MGMT. POLICY § IV(A), *available at* http://www.metmuseum.org/Works_Of_Art/collection_database/collection_management_policy.aspx#deaccessioning (last visited Sept. 7, 2010).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ INDIANAPOLIS MUSEUM OF ART, INTERACTIVE DASHBOARD, <http://dashboard.imamuseum.org/> (last visited Sept. 7, 2010).

deaccession proceeds. Because of the transparent nature of the sales, the museum has been able to avoid the criticism other museums have faced.²⁰⁸

Museums and other non-profit organizations could also be given priority or incentives at auctions and sales. When the New York Historical Society faced eminent closure, the New York attorney general approved a deaccession plan that would encourage collecting organizations to purchase the objects.²⁰⁹ Organizations were allowed to undercut final bids and set up long repayment plans.²¹⁰

If other museums do not purchase a deaccessioned object within a reasonable period of time, the selling museum should approach private collectors. Sales to private collectors, though discouraged by critics, actually improve the art market and benefit museums in the long run.²¹¹ Private art collectors keep art dealers in business.²¹² Art dealers keep artists in business.²¹³ If museums sell solely to other museums or public institutions, art is taken off the market and prices of the pieces left on the market are raised.²¹⁴ If art becomes too expensive for private collectors to purchase, art dealers and artists are affected.²¹⁵ When private collectors' collections suffer, they may be less likely to loan to museums or their collections may no longer be museum-quality.²¹⁶ Cutting out private collectors from the art market negatively affects artists and museums.

Some deaccession critics have championed museums' efforts to offer art back to artists.²¹⁷ This, however, appears to be a no better solution than private dealers. Artists are generally not in a position to display the art publicly and the museum is receiving below market value. Though a generous offer, the museum owns the title of the object and is in no way obligated to lose money on a purchase. In fact, museum board members breach their fiduciary duties to make the trust property productive when they sell art below market value.

²⁰⁸ Pogrebin, *supra* note 148 (Indianapolis Museum of Art director Maxwell L. Anderson explaining that when other museums sell art without transparency, “[t]here is nothing devious going on. They are just not handling it in a way that is candid and explained.”).

²⁰⁹ MALARO, *supra* note 71, at 233. The Attorney General also approved the museum's use of deaccession proceeds for “acquisitions, direct care of the collection (e.g., curatorial staff salaries and other expenses incurred in conversation and preservation; rehousing or storage), and collections management.” *Id.* at 233 (citing P. Zimmerman, *Financial Stabilization and Deaccessioning at the New York Historical Society*, AAM ANNUAL MEETING, May 1995 (Sourcebook)).

²¹⁰ MALARO, *supra* note 71, at 233.

²¹¹ *But see* Daniel Grant, *Is the University's Museum Just a Rose to Be Plucked?*, WALL ST. J., Feb. 3, 2009, at D7 (criticizing private sales because the museum may not get the highest price and it does not ensure sales transparency); Mike Boehm, *Paintings' Quiet Sale Stumps Art World; An O.C. Museum's Deal Raises Some Eyebrows and Is Seen as a Snub*, L.A. TIMES, July 5, 2009, at A1 (discussing the criticism of Orange County Museum when it sold eighteen objects to an undisclosed private dealer for possibly half the value and denied other museums the option to buy the objects by keeping the sale quiet).

²¹² *See* VAN DER GRIP, *supra* note 182, at 110–11.

²¹³ *See id.*

²¹⁴ When art is auctioned at high prices, it affects the prices of other art by the same artist or in the same genre. *See id.*

²¹⁵ *See id.*

²¹⁶ In St. Louis alone, there are fifty recognized art collectors whose collections “would have significance for art history.” *Id.* Objects in the collections are regularly loaned to museums. *Id.*

²¹⁷ *See* Genocchio, *supra* note 192 (quoting the American correspondent for the London-based *Art Newspaper* praising the Aldrich Museum for offering works back to the artists).

D. DEACCESSION PROCEEDS, INVESTMENTS, AND INTEREST

Once an object has been deaccessioned and sold, the proceeds received should be placed in a high-interest yielding Deaccession Fund (“Fund”). The corpus of the Fund would be limited to use for future acquisitions. The investment income from the fund would be split between reinvestment in the corpus, care and management of current collections, and operating expenses. This restricted-use fund would provide for future acquisitions while at the same time alleviating museums’ financial burdens caused by the financial crisis, filled storage space, and refocused missions.

The arts community is not unanimous about using deaccession proceeds for expenditures other than acquisitions and direct care and management of the collection.²¹⁸ There is a concern that “once selling art to cover operating costs is allowed, it will become the first resort in bad times, not the last.”²¹⁹ Using a restricted percentage of investment income for operating, however, “adds much needed flexibility to museum finances.”²²⁰

There are dangers in limiting a museum’s use of deaccession funds to future acquisitions. For example, when the Thomas Jefferson University in Philadelphia proposed to sell its Thomas Eakins’s *The Gross Clinic* for sixty-eight million dollars to out-of-state museums, the Philadelphia Museum of Art and the Pennsylvania Academy of Fine Arts sold four “lesser” works by Eakins in a forty-five day quick sale to raise enough funds to save the “better” *The Gross Clinic*.²²¹ Three of these “lesser” Eakins were sold to a Colorado museum and one, *The Cello Player* was sold to a private dealer.²²² Thus, allowing a museum to use deaccession proceeds for operating expenses could not have hurt public trust more so than this.²²³

While the original deaccession proceeds in the Fund will have to be substantial enough to create an annual spendable rate that preserves the principal, the Fund will be self-perpetuating if the museum adheres to the Fund terms by replenishing the principal with income interest. In light of the above discussion of the current financial crisis and the poor performance of museums’ general endowments, it should be noted that the Fund may not immediately provide for a large interest income.

Museum board members should be held to the high prudent investor standard in care and management of the Fund. If held to this legally enforceable standard, museum board members will not be able to dip into a deaccession account whenever there is “extravagance, waste, or error.”²²⁴

²¹⁸ See James N. Wood, Editorial, *When Museums Sell Art to Raise Cash*, N.Y. TIMES, Jan. 8, 2010, at A26 (in a letter to the editor the president and CEO of the J. Paul Getty Trust opined that selling art to “deal” with a museum’s financial crisis would “not work” and “have unintended consequences”). Woods argues that because mismanagement is the cause of museum financial difficulties, museums should have stricter acquisition policies instead of broader deaccession policies. *Id.*

²¹⁹ Dobrzynski, *supra* note 10.

²²⁰ Gerstenblith, *supra* note 64, at 424.

²²¹ See Carol Vogel, *Philadelphia Raises Enough Money to Retain a Masterpiece by Eakins*, N.Y. TIMES, Apr. 24, 2008, at E3.

²²² *See id.*

²²³ *See id.*

²²⁴ WEIL, *supra* note 187, at 143.

Additionally, the board will not be able to invest the Fund in risky though high-yield assets. Instead, museum board members would be required to invest the Fund while keeping in mind the museum's overall financial strategy and purpose.

Applying a portion of the interest income to operating costs will not create a conflict of interest. Museum management deciding to dispose of an object in order to increase compensation levels will not create a conflict of interest because the decision to deaccession will have to be justified at every level. Additionally, a board can restrict which salaries are affected by the income or restrict the percentage of proceeds that can be applied to salaries. If the salaries of the board itself are not increased, then the board's final decision to deaccession an object will cleanse all other decisions from conflict.

E. OUTSTANDING ISSUES AND CONCERNS

Museums and members of the arts community—beyond the leaders of the AAM and AAMD—may hold reservations about the flexibility of this proposed deaccession policy. There may be a concern that if museums dispose of objects to defray financial strain there will be a perceived availability of “open reserves” and donors may be less willing to donate.²²⁵ In the past, donors have balked at proposed and actual deaccessions. Leaders of the Warhol Foundation, a financial backer to the Orange County Museum of Art, were appalled at the museum's recent deaccessioning of objects, saying “‘we will have to reevaluate’ whether to continue [backing exhibits].”²²⁶ In light of fewer donations or donations with restrictions, museums should have completely transparent deaccessioning policies by making proposed deaccessions and the use of the Fund public information.

There may also be concerns about accounting requirements under the proposed deaccession policy. Currently, museums are not forced to capitalize their assets by the Financial Accounting Standards Board (FASB).²²⁷ FASB, however, requires that if an institution does not capitalize its collections, those collections can be subject to “an organizational policy that requires the proceeds from sales of collection items to be used to acquire other items for collections.”²²⁸ Allowing museums to apply deaccession proceeds to operating costs may change FASB's accounting requirements for museums.

VII. GLENBOW: A CANADIAN PROFILE

Glenbow Museum²²⁹ is the largest museum in western Canada, founded by a man who had amassed a large collection by telling his staff to

²²⁵ *Id.* at 140–41 (“How long, for example, might the taxpayers of a community tolerate the use of their money to help support the operation of a local museum that was perceived as readily able to provide its own support by simply making a few additional sales from its collections?”).

²²⁶ Boehm, *supra* note 211.

²²⁷ Rohner, *supra* note 13, at 63.

²²⁸ *Id.* at 63–64.

²²⁹ Glenbow is not a member of AAM or AAMD.

“[c]ollect like a bunch of drunken sailors” which resulted in an unfocused and over-collected museum with around 1.3 million objects in its collection.²³⁰ From 1980–1992, the museum sold thirty thousand objects that were duplicates, lacked provenance, or were of inferior quality. The deaccession proceeds were used for more acquisitions. In the 1990s, the museum lost significant private and government funding, prompting the museum management to create a budgetary forecast that predicted the museum’s bankruptcy in five years at a \$7.7 million deficit.²³¹ The management adopted a refocusing plan that included deaccessioning as one of its key survival strategies. “This notion of fiduciary trust—that you have to keep everything forever—is just incredibly unrealistic,” said then director Robert Janes.²³²

The new deaccession policy (1) included museum quality items and even prized collections; (2) required a deaccession recommendation to start with a curator and move up the management chain through the director, executive director, and collections management committee to receive a final approval from the board of governors; (3) gave other Canadian museums first chance at purchasing the deaccessioned objects; and (4) prohibited privately donated items from being deaccessioned.²³³ Under the deaccession policy, the museum deaccessioned 3000 objects by selling them to Canadian museums and at auction for \$3.4 million. The proceeds from the deaccessioned objects were placed in a Collections Fund.

The Collections Fund operates as an endowment funded by the deaccessioning net proceeds. Capital expenditures from the Collections Fund are limited to acquisitions.²³⁴ Investment income is split between maintaining the value of the Collections Fund and an Operating Fund for the “care and maintenance of the collection” at the board of governors’ discretion.²³⁵ The purpose of the Operating Fund generally is for “administrative activities, fundraising, and the costs of maintaining and allowing public access”—in effect, operating costs.²³⁶

Glenbow Museum’s revised deaccessioning policy saved the museum and benefitted it in the long run. In fiscal 2003, the museum invested \$1,191,375 from deaccession proceeds into the Collection Fund.²³⁷ In fiscal 2004 year, the museum invested \$208,389 in the Collection Fund, which had a market value of \$5,271,846.²³⁸ Starting in fiscal 2006, the museum continued to maintain the Collections Fund by using investment income and investing its net deaccessioning proceeds in a Glenbow fund that is part of the Historic Resources Fund of Alberta Community Development.²³⁹ By

²³⁰ Patricia Ainslie, *Deaccessioning as a Collections Management Tool*, in *MUSEUMS AND THE FUTURE OF COLLECTING*, *supra* note 196, at 174

²³¹ *Id.* at 173.

²³² Nazarov, *supra* note 34.

²³³ Ainslie, *supra* note 230, at 175–76.

²³⁴ GLENBOW MUSEUM, GLENBOW ANNUAL REPORT 2007/08 18 (2008).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ The museum was conducting a library deaccessioning project and the proceeds were later moved to a Library Fund. GLENBOW MUSEUM, 2003/04 ANNUAL REPORT 16 (2004).

²³⁸ *Id.*

²³⁹ *Id.*

investing its deaccession funds, “Glenbow believes it is ensuring the prudent application of its resources and maintaining public confidence.”²⁴⁰

VIII. CONCLUSION

In May 2009, the Art Institute of Chicago increased ticket admission prices by 50 percent to defray operating costs. When Chicagoans threatened to stop visiting, the museum explained that the increase was essential “if the Art Institute is to continue to uphold its mission and serve its community.”²⁴¹ If the museum sold less than 1 percent of its collection and applied the proceeds to operating costs, admission would be free for everyone in perpetuity.²⁴² This illustrates how the current financial crisis has left museums without sufficient funding, forcing them to make extreme cutbacks or even to close permanently, thus hurting communities and disposing of entire collections to auctions houses, private dealers, and even creditors. To preserve the public’s interest in their collections, museums must be given a means to remain solvent or more museums will be forced to close. Although drastic and counter to the traditional view that museums are temples to the human story, museums should be allowed to use deaccessioning to preserve the public’s interest and remain viable. Museum board members have fiduciary duties of care and loyalty to hold the museum and its collections in trust for the public. It is unreasonable to interpret that as holding on to every piece of art unless it fulfills one of the AAMD or AAM’s strict deaccessioning criteria.

Instead, museums should be able to deaccession and dispose of objects that are financial burdens on the museum. Additionally, museums should establish and invest a Deaccession Fund funded by deaccession proceeds. The corpus of the fund should be used for future acquisitions; this is well established in the arts community, ethics standards, and actual museum practice.²⁴³ If, however, museums can apply interest earned from the fund toward operating costs, museums can defray costs of exhibitions, staffing, maintenance, and storage exacerbated by the financial crisis; improve community relations with programming, exhibitions, lowered admission costs, and longer opening hours; and keep art in public trust for future generations.

Museum board members are often in the best position to know when a museum’s financial situation requires an object to be sold. The court, however, should scrutinize a decision if there is fraud, self-dealing, or gross negligence—such as liquefying assets to cover grossly negligent

²⁴⁰ Ainslie, *supra* note 230, at 178.

²⁴¹ Lee Rosenbaum, *Recession Transgression: Chicago’s 50% Admission Fee Hike*, CULTUREGRRRL, (June 2, 2009 10:46 AM), http://www.artsjournal.com/culturegrrl/2009/06/recession_transgression_chicag.html.

²⁴² Rohner, *supra* note 13, at 54.

²⁴³ The Albright-Knox Art Gallery’s acquisitions endowment, funded by deaccession proceeds, quadrupled in two years because of the seventy-one million dollar sale in 2007. Tom Buckham, *Art Gallery Has Momentum; New Board President Expects to Build on Earlier Success*, THE BUFFALO NEWS, Oct. 22, 2009, at A1. Nevertheless, the museum has been forced to cut hours and lay off staff because its operating budget is suffering and it cannot use its acquisitions endowment to pay for operating costs. *Id.*

management decisions. By applying a two-tiered fiduciary standard to museum board members, the decision to deaccession will be protected from court oversight by the business judgment rule, while the museum board's investment, care, and use of the Deaccession Fund will be held to the highest trust standard under the prudent investor rule.

While deaccessioning for financial survival is a “dirty word” in some museum circles,²⁴⁴ the words “permanent closure” are sweeping through the arts community at an alarming rate. Accordingly, deaccessioning—though an extreme step—is a financial tool necessary today to preserve art and museums for public use in the future.

²⁴⁴ In his 1997 note entitled *Deaccession: Not Such a Dirty Word*, Jason R. Goldstein discusses the necessity of deaccessioning when a museum is in financial straits. Jason R. Goldstein, Note, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 216 (1997).